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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

Final report by Mr. Danilo Türk and Mr. Louis Joinet,
Special Rapporteurs

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* To be distributed as document E/CN.4/Sub.2/1992/9/Add.1.

INTRODUCTION

1. In resolution 1991/39 of 30 August 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities took note of the updated preliminary report on the right to freedom of opinion and expression prepared by its Special Rapporteurs, Mr. Louis Joinet and Mr. Danilo Türk (E/CN.4/Sub.2/1991/9) and invited them to prepare a report for consideration at the forty-fourth session containing conclusions and recommendations and taking into account the observations made during the discussion of the updated preliminary report at the forty-third session.

2. In the present final report the Special Rapporteurs summarize the results of the analyses they have pursued since 1987 and offer their conclusions and recommendations. The latter are contained in an addendum (E/CN.4/Sub.2/1992/9/Add.1). The report is based on the working papers and reports prepared earlier: the first working paper was prepared by Mr. Joinet (E/CN.4/Sub.2/1987/15, annex 1), and the second by Mr. Türk (E/CN.4/Sub.2/1989/26). The two working papers were followed by the Special Rapporteurs' preliminary report (E/CN.4/Sub.2/1990/11), which was updated in 1991 (E/CN.4/Sub.2/1991/91). In this final report the Special Rapporteurs have not repeated the material contained in the earlier documents. Thus, for example, in the updated preliminary report (E/CN.4/Sub.2/1991/9, paras. 106-137), the Special Rapporteurs paid particular attention to questions of freedom of expression and information in armed conflicts which were discussed in the light of experience gained during the Gulf War that year. In that context, it is important to note that some of the problems discussed seem to have been resolved through negotiations held between the United States Defence Department and key press associations as well as top officials from 20 news organizations who agreed on the necessary level of restrictions on press freedom during an armed conflict.

3. Another new development which the Special Rapporteurs were aware of - although, at present, it does not necessitate special consideration within the present report - concerns the UNESCO initiative on promotion of the freedom of the press in the world. (UNESCO, General Conference, twenty-sixth session, resolution 4.3 of 6 November 1991.) In the resolution, UNESCO proposed that the United Nations General Assembly proclaim 3 May as International Freedom of the Press Day. This initiative is interesting and represents, inter alia, an important means of promoting the right to freedom of opinion and expression. In this connection, the Special Rapporteurs wish to emphasize the need for enhanced coordination within the United Nations system of activities directed towards realization of the right to freedom of opinion and expression.

I. GENERAL REFLECTIONS ON THE RIGHT TO FREEDOM OF OPINION AND OF EXPRESSION

4. The right to freedom of opinion and expression is a decisive vehicle of social change and as such will always be at the centre of political struggles and discourse. The recent changes in Eastern and Central Europe and in other parts of the world have confirmed this once again. The changes that will be necessary in the future will be possible only if the right to freedom of

opinion and expression is preserved and properly protected: hence the relevance of discussion in international forums, particularly the United Nations, as part of the broader efforts to promote and protect this right.

5. The right to freedom of opinion and expression should not be seen in isolation, but in the context of other human rights. The right can have its full meaning only when seen together with all other human rights. The concept of the indivisibility and interdependence of human rights, which is now widely accepted in human rights discourse, can be represented as a set of concentric circles. The first circle would probably encompass such rights as freedom of thought, conscience and religion. Next would come freedom of assembly and freedom of association and the right of peaceful demonstration, followed by the right to take part in government. The immediate connection between these rights and the right to freedom of expression is obvious in all concrete situations. All other civil and political rights are normally indirectly connected with the right to freedom of expression. The same is true of economic, social and cultural rights and the right of peoples to self-determination.

6. The exact nature of these interrelationships can be properly discussed only in concrete terms, that is in the context of a given case of realization or violation of the right to freedom of opinion and expression. Thus in the social context of one country, particular attention should be paid to the realization of a minimum standard of education (elimination of illiteracy) to enhance the possibilities for people to exercise their right to freedom of opinion and expression, while in another context the realization of this right may require the removal of obsolete political structures which prevent people from taking part in the government of the country. The struggle for certain economic rights (minimum wages, favourable working conditions or trade union rights) has in many cases provided the context for affirmation of the right to freedom of expression, as has the struggle for self-determination or the struggle for genuine, free and periodic elections. The right to freedom of opinion and expression is of permanent relevance, which no social change can reduce, still less make obsolete. The dramatic changes that have taken place in the past few years have demonstrated this, and it is safe to say that the newly emerging democracies have yet to discover the problems and solutions which will make the right to freedom of expression an effective guarantee of freedom, democracy and social progress.

A. Main elements of the right to freedom of opinion and expression

7. Article 19 of the Universal Declaration of Human Rights reads:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

This text was formulated by the distillation of a number of elements embodied in national constitutions and legislation and in various drafts submitted to the General Assembly. 1/ It succinctly expresses the main idea and was used as the basis for the formulation of treaty provisions on the right to freedom

of expression. The text is of twofold importance. It expresses the core content of the right without entering upon the difficult question of the legal regime of freedom of expression and it sets the basic guideline for interpretation of the treaty provisions and of the national laws which affect the right and its implementation.

8. Article 19 of the International Covenant on Civil and Political Rights provides:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals."

These provisions set out the basic elements of the right to freedom of expression, those defining the right itself and those which provide the basis for certain restrictions. The regional instruments generally follow the same pattern. 2/

9. An important feature of article 19 of the Covenant is the distinction between the right to hold opinions without interference (para. 1) and the right to freedom of expression (para. 2), which may be subject to certain restrictions (para. 3). Unlike the regional treaties, in which this distinction is not made so clearly, the Covenant makes freedom to hold opinions absolute, while freedom of expression may be subject to certain restrictions - which are however without prejudice to the principle of freedom of expression.

10. The absolute nature of the right to hold opinions without interference (art. 19, para. 1 of the Covenant) raises the question of the relationship between that right and the right to freedom of thought, conscience and religion (art. 18). Do the two rights express essentially the same idea or can a distinction be made between them on the basis of their content? As Partsch has suggested, "there are no clear frontiers between 'thought' and 'opinion'; both are internal. 'Thought' may be nearer to religion or other beliefs, 'opinion' nearer to political convictions ...". 3/ If, as we tend to believe, this interpretation is correct, we may assume that expression of an opinion relates to secular and political matters rather than to religious ones. However, in practice the frontier may not necessarily be very clear. The right to freedom of expression includes the right to seek, receive and impart information and ideas of all kinds.

11. From the outset, before the Universal Declaration of Human Rights was drafted, the United Nations was concerned with freedom of information. At its first session in 1946 the General Assembly considered freedom of information to be a fundamental human right, and two years later the United Nations held a conference on freedom of information. The Conference (which made a comparative analysis of legislation in force that was later used in the preparation of the Universal Declaration) prepared a draft convention on the international right of correction (which was adopted in 1952 and entered into force 10 years later). The draft convention on freedom of information was, however, not completed and attempts to elaborate a declaration on the subject were also unsuccessful. 4/

12. The difficulties experienced by the Organization in dealing with freedom of information suggest that the United Nations human rights organs should approach the question cautiously. The travaux préparatoires of the International Covenant on Civil and Political Rights seem to confirm that the word "information" was inserted into article 19 without thorough consideration of the implications. 5/ It was only later that the difficulties became fully apparent.

13. The term "information" has several meanings. Information is a tradeable commodity available to the haves and inaccessible to the have-nots and a component of economic, political or military power. 6/ In a legal sense it is subject to regulation in various branches of law: intellectual property law, transport and communication law, space law, customs and tariff regulations and the emerging GATT rules relating to the trade in services, etc. It may also be subject to various restrictions, such as those relating to State or military secrets. In view of the variety of meanings attached to the word "information" considerable caution is called for when the term is used in human rights discussions. The precise meaning of the term should be defined concretely in the context of the relevant circumstances, proceeding from the principle that all types of information should be available to everyone.

14. In the United Nations debates on freedom of information which started in 1946 new concepts were introduced with the aim of describing properly the essential features of the information process and setting the international community's objectives. The concept of "freedom of information" was replaced by the notion of "free flow of information" and "free and balanced flow of information", which became one of UNESCO's priorities in the mid-1970s. The term "information" was coupled with the term "communication" in an attempt to describe the realities and the goals of the debate more accurately.

15. UNESCO's concerns in the field of information and communication were the subject of a number of studies, the best known being Many Voices, One World (1980). The authors wrote:

> "Communication, nowadays, is a matter of human rights. But it is increasingly interpreted as the right to communicate, going beyond the right to receive communication or to be given information. Communication is thus seen as a two-way process, in which the partners - individual and collective - carry on a democratic and balanced dialogue. The idea of dialogue, in contrast to monologue, is at the heart of much contemporary

thinking, which is leading towards a process of developing a new area of social rights. The right to communicate is an extension of the continuing advance towards liberty and democracy ...". 7/

The passage quoted shows the broad scope of the new notion of the right of communication. It remains to be seen, however, whether the right can be effectively expressed in political terms and legal regulations and whether its potentialities can be reflected in practical results.

16. The right of communication is a complex notion which can be gradually translated into reality through the concrete expression of its various components. 8/ Some of them are far from new, such as the need for a genuine pluralism of information sources, 9/ the right to express political or other ideas developed on the basis of information coming from various sources, the protection of freedom of expression by the courts and in consequence a genuine political dialogue in society necessitating freedom of assembly and association and free and fair elections. A dialogue of this kind might lead towards "a process of developing a new area of social rights". What is more, it enhances the importance of the "old" human rights. The political changes in a number of countries in recent years have once again confirmed the relevance of the "classical" content of the right to freedom of opinion and expression to the creation of a "new" social reality.

17. In both dimensions - in the development of a new area of social rights and in the reinforcement of classical human rights - what is at stake is political participation. It is through political participation that new social rights emerge, but this is likely to be the case only if civil and political rights are respected and made use of.

18. The right to freedom of expression can be exercised through different media. The fact that article 19 of the International Covenant does not list media other than the principal forms ("orally, in writing or in print, in the form of art or through any other media of his choice") is important as it does not rule out any of the possibilities of further technical development of media which may be appropriate for the realization of freedom of expression. It is also important that specific questions of the legal regime of different media (e.g. licensing of radio and television) are not raised. All questions of this kind have to be seen in the context of the provisions stipulating permissible restrictions on the right to freedom of expression.

19. Finally, the words "regardless of frontiers" are important. The least they suggest is that information and ideas sought, received or imparted abroad should be subject to no other limitations than those stipulated in article 19, paragraph 3 of the Covenant.

B. Are there permissible restrictions on the right to freedom of expression?

20. In real life the individual's possibilities of realizing his or her freedom of expression in a meaningful way depend on numerous factors. 10/ In law the principle of freedom of expression may be subject to certain legally permissible restrictions. Such restrictions can, however, be considered acceptable only if they do not jeopardize the principle itself. In

interpreting the legal norms, the principle must be interpreted broadly and the permissible restrictions restrictively. It would therefore be useful to develop a set of "restrictions on restrictions" so as to protect the basic principle from the threat inherent in any provision permitting restrictions.

21. In emphasizing these basic legal requirements we may add that the individual's right to freedom of expression represents one of the genuine developmental needs of society as a whole. From a social standpoint, it should therefore be fully respected and should not be subjected to extensive restrictions.

22. After these general remarks we shall take up some questions raised in the provisions of article 19, paragraph 3 of the Covenant. These provisions relate to permissible restrictions of the right to freedom of expression, and generally speaking follow the logic of similar clauses in the Covenant.

23. There is one exception. The first sentence of article 19, paragraph 3 reads: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities". This provision can be interpreted in two ways, as a "preamble" introducing the more specific provisions of the paragraph or as a general rule having an independent value. Lawyers generally tend to agree with the first of the two interpretations, which is more coherent and clearer. On the other hand, this interpretation may not exhaust all the implications of the reference to "special duties and responsibilities" in the paragraph. It could be argued that this reference leaves room for moral as well as legal considerations. The veracity and accuracy of information and the responsible formulation of an opinion are the moral ingredients which constitute parts of the totality of the right to freedom of expression. This implies that certain types of self-regulation and self-restraint (for example, with a view to achieving a responsible formulation of an opinion on a controversial subject) can be considered as morally justified, provided, of course, that they do not result from external pressure contravening the legal requirements of article 19 of the Covenant.

24. As regards legal restrictions of the right to freedom of expression, the provisions of article 19, paragraph 3 seem to be quite clear. Restrictions have to meet the criteria of legality and necessity and can only be devised in the interest of respect for the rights and reputations of others and the protection of national security, public order, public health or morals. The problem of legally permissible restrictions of the right to freedom of expression demands careful consideration. History teaches that restrictions have an unfortunate tendency to spread beyond the limits within which they were originally conceived. In a general comment on article 19, the Human Rights Committee observed: "Many reports of States parties confine themselves to mentioning that freedom of expression is guaranteed under the Constitution or the law. However, in order to know the precise regime of freedom of expression, in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right." 11/

25. Another thought which might be added to the Committee's comment is that in interpreting restrictions of the principle of the right to freedom of expression the presumption is always in favour of freedom of expression, i.e. in favour of the principle. The proponent of a restriction bears the burden of proof regarding the necessity and legality of the proposed restriction, as well as regarding its compatibility with the principle of the right to freedom of expression. In fact, restrictions should not be perceived as permanent, but rather as temporary features of the "actual scope of the individual's right." Legally defined restrictions of the right to freedom of expression vary. By way of illustration, the following types of restrictions may be accepted as admissible under article 19, paragraph 3.

(a) Restrictions with the sole purpose of protecting respect for the rights or reputations of others, such as restrictions resulting from criminal or civil law provisions against defamation or for the protection of privacy: such laws may also provide for a right of reply in the press.

(b) Restrictions with the purpose of protecting national security, such as restrictions relating to military and State secrets. In this connection, mention should be made of the problems arising from the ambiguity of provisions defining the concept of military or State secrets, etc. or the penalization of incitement to treason or sedition. Here again caution is called for; the term "sedition" may be given a very broad interpretation and used to bar the exercise of the right to freedom of expression. 12/

(c) Restrictions with the purpose of protecting public order, bearing in mind the problems arising from the ambiguity of the notion of public order. 13/

(d) The protection of public health may require certain restrictions of the right to freedom of expression. e.g. controls on advertising tobacco and alcohol and warnings of the health hazards of pharmaceutical and other products.

(e) Restrictions to protect public morality are an area of law which is the subject of lively debate in many countries. Legislation against obscenity and the dissemination of pornographic material and laws providing for prior censorship of films are the most obvious examples. In many countries there are laws against blasphemy which could probably be categorized as limiting freedom of expression on the grounds of the protection of public morals.

C. Article 20 of the International Covenant on Civil and Political Rights

26. In addition to restrictions (usually provided for by law) which fall within the scope of article 19, paragraph 3 of the Covenant, another group of permissible restrictions of the right to freedom of expression are provided for in article 20:

"1. Any propaganda for war shall be prohibited by law.

"2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

27. The distinctive feature of these restrictions is that they expressly require States Parties to the Covenant to prohibit certain activities by law. In this connection the Human Rights Committee noted in a General Comment on article 20, that reports by States Parties showed that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them". 14/ The Committee expressed the view that:

> "The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter." 15/

The Committee also considered that prohibitions required by article 20 are "fully compatible with the right to freedom of expression contained in article 19, the exercise of which carries with it special duties and responsibilities". 16/

28. The interesting aspect of this interpretation is the absence of any specific reference to violence (for example, to the link, albeit indirect, between incitement to hatred and violence). Criminal proceedings are normally instituted because of the element of violence. Other forms of incitement to hatred and discrimination are more difficult to establish (question of fact). Particular vigilance is needed to keep the restriction within the limits determined by the requirements of necessity and proportionality (question of law). The United Nations human rights bodies should pay due attention to these problems and Member States, specialized agencies and other intergovernmental organizations, as well as non-governmental organizations, should be able to make their contribution to the consideration of these questions.

D. Restrictions which may jeopardize the right to freedom of expression

29. Restrictions of the right to freedom of expression may be so broad in scope or drafted in such terms as to put the right itself in jeopardy. For instance, limitations which would otherwise be permissible under article 19, paragraph 3 (for instance laws relating to official secrecy) may be defined too vaguely or too broadly and thus jeopardize the right to freedom of expression.

30. An even more dangerous approach is taken by those States which criminalize acts that could be described as "délits d'opinion", in criminal provision which are broad, unclear, ambiguous or "catch-all" in nature. Criminalization of "hostile propaganda" or "agitation" are classical examples. In practice such formulations sometimes provide the legal basis for the imposition of heavy penalties on people who have expressed opinions but have not resorted to or advocated violence. In such situations the minimum standards of due process of law are very often not observed.

31. Another example of limitations which jeopardize the right to freedom of expression is provided by laws and regulations applicable in emergency situations which generally involve derogation from or very serious restrictions on the right to freedom of expression. Given the number of countries which have imposed emergency measures derogating from their obligations in the field of human rights, the problem deserves very serious consideration. 17/

32. Lastly, mention should be made of the legal systems of States which are constitutionally committed to a certain public philosophy 18/ (an ideology or religion) and which permit freedom of expression only in so far as it is in accordance with that philosophy. Discussion of the compatibility of such legal systems with universally accepted standards of human rights might be interesting. 19/ However, a much more interesting question is that of the prospects for change so as to make such legal systems consistent with article 19 of the Covenant. The democratic changes in East and Central Europe in the past few years have shown that such change is possible. A question that remains to be considered is whether democratic change necessarily implies renunciation of the public philosophies concerned or whether democratic transformation can be achieved by peaceful and orderly change in political structures and governing élites. These questions are outside our terms of reference. However, some basic considerations regarding the right to freedom of opinion and expression are relevant in this context. If the right is to be effective, its exercise should not be tied to any particular public philosophy. Expression of ideas "of any kind", as stipuated in article 19 of the Covenant, is an essential ingredient of genuine freedom of expression. 20/ A further requirement is the abolition of prosecution for the expression of opinion. This implies the need for the elimination from the legal system of all the types of restriction mentioned in the preceding paragraphs of this section.

E. The thorny question of sanctions affecting persons who express their opinions

33. The exercise of freedom of opinion and expression sometimes leads to conflicts between the individual and various institutions of the State or society. In such circumstances pressure is often put upon the individual in the form of sanctions, which vary in content and character. 21/ They range from disciplinary sanctions, fines, economic and similar sanctions (loss of employment, suspension or revocation of licences, withdrawal of financial support for research work, expulsion from a university, etc.) to deprivation of liberty, including arbitrary detention without charge or trial, torture, disappearance and extrajudicial execution.

34. The breadth of the notion of "sanction", when considered in the context of action value of groups, institutions and the State to silence individuals, calls for judicious selection of the type of sanctions to be discussed. We believe that our report should focus on some of the problems relating to detention. This approach is proposed because detention, as a negative sanction for the peaceful expression of opinion, is one of the most reprehensible practices employed to silence people and accordingly constitutes

a serious violation of human rights. In addition, it should be borne in mind that the Commission on Human Rights has paid considerable attention to the detention-related problems of the exercise of the right to freedom of opinion and expression. 22/

II. PROPOSALS FOR AN INTERPRETATION OF THE LEGAL REGIME GOVERNING THE EXERCISE OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

35. In the light of the preceding section, the Special Rapporteurs reaffirm that the right of everyone to hold opinions is an absolute right which admits of no restrictions. With respect to freedom of expression, some restrictions are permissible. It is however necessary to repeat that the right to freedom of expression must be interpreted extensively and permissible restrictions restrictively. In other words, it is essential to the rule of law to develop a set of "restrictions of restrictions" to protect the basic right to freedom of expression. The purpose of this section is to inquire into the relationship between the right to freedom of expression and permissible restrictions. We will propose the main and internationally relevant elements of what could be called, in words borrowed from the Human Rights Committee, "the regime of the right to freedom of opinion and expression".

36. In this connection it should be noted that our analysis does not claim to be exhaustive. We will not for example deal with the question of derogations from the right to freedom of expression when exercise of the right is suspended in situations of emergency. We recognize the paramount importance of this issue, since freedom of opinion and expression are generally among the first victims when derogations from human rights are imposed in a state of emergency. The Sub-Commission has been active in the problem area of states of emergency for a long time 23/ and is seized of them continuously. 24/ To avoid overlapping, we will not take up these matters. The reader is referred to the periodic reports of the Special Rapporteurs on states of emergency.

A. The basic elements of the right to freedom of opinion and expression

37. As was noted earlier (para. 9), the wording of article 19 of the Covenant clearly establishes that the right to freedom of opinion is to be regarded as an absolute right which admits of no restrictions while the expression of opinion - in other words freedom of expression - may be subject to certain restrictions. This approach is somewhat unusual, since other international human rights instruments do not make the distinction as clearly as the Covenant. The formulations involving the terms "opinion" and "expression" vary. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (d) (viii)) and the International Convention on the Suppression and Punishment of the Crimes of Apartheid (art. II (c)) refer to the "right to freedom of opinion and expression". The two conventions suggest that the two concepts essentially constitute a single whole, which is understandable in view of the objectives of the two instruments. The prevention of discrimination and suppression of apartheid require equal treatment and no differentiation can be envisaged with regard to the expression of opinions promoting racism and *a fortiori* apartheid. They are clearly prohibited by these two Conventions.

38. The Convention on the Rights of the Child recognizes the right of the child to express his or her own "views" and to enjoy respect of the right to "freedom of thought, conscience and religion". Neither of these rights is defined as absolute and elements such as the "age and maturity" of the child and his or her "evolving capacities" are important in giving "due weight" to the "views" and in providing "direction to the child" in matters concerning his or her thought, conscience and religion. On the other hand, the provisions (art. 13) regarding the child's right to freedom of expression are formulated in terms close to those of article 19 of the Covenant. The right to freedom of expression is not absolute and may be subject to certain restrictions.

39. The Declaration on the human rights of individuals who are not nationals of the country in which they live (General Assembly resolution 40/144 of 13 December 1985) underscores the difference between the two concepts. The right to freedom of opinion is considered together with freedom of thought, conscience and religion (art. 5.1 (e)), while the provisions regarding the right to freedom of expression are formulated in a separate article (art. 2 (b)).

40. The foregoing discussion (paras. 37 to 39) shows that the difference between the notions of "opinion" and "expression" is recognized in United Nations instruments. However, it is less clear that while the right to freedom of opinion enjoys absolute protection - a view the rapporteurs share - in all United Nations human rights instruments this is not the case in regional human rights instruments.

41. In most cases, the provisions of regional human rights instruments do not make a clear distinction between the two notions. Thus, article 13 of the American Convention on Human Rights refers to a single right, the right to "freedom of thought and expression". The African Charter on Human and Peoples' Rights provides, in article 9, for protection of the freedom to express opinions. The right to hold opinions is not specifically protected. The European Convention on Human Rights provides in article 10 for protection of the "right to freedom of expression", which includes "freedom to hold opinions". The latter concept is therefore defined as a part of the former and the whole may be subject to certain "formalities, conditions, restrictions or penalties".

42. The immediate conclusion suggested by the formulation of the basic notions of "opinion" and "expression" in the regional human rights instruments would be that there is no clear distinction and that the right to hold opinions does not enjoy absolute protection. The European Convention is the most ambiguous in this respect.

43. However, the case law of the European Court of Human Rights has clarified these concepts. In the Lingens case (8 July 1986) the Court clearly distinguished between the right of a journalist to impart information from freedom of opinion and the right to communicate ideas. The Court made this distinction in a case involving article 111 of the Austrian Penal Code. The journalist, Mr. Lingens, who was accused of defamation, would have been convicted for defamation irrespective of the truth of his statements. The

Court held that in the case of value judgements, i.e. opinions, the requirement was illogical and ran counter to freedom of opinion itself, a fundamental component of the right guaranteed by article 10 of the European Covention. This example, which illustrates the need to facilitate transmission of an opinion (and not information) supports the case for giving freedom of opinion a separate place. A fortiori, opinions not yet communicated to others must enjoy even stronger protection. According to some commentators information is primarily concerned with objective data and ideas with intellectual constructs. Information is primarily within the realm of objective reality while the expression of ideas involves "value judgements".

44. The foregoing reflections on the basic notions of the right to freedom of opinion and expression are necessarily provisional in nature. As demonstrated in the preceding paragraph and in the formulations in the relevant international instruments, the use of terms denoting the basic notions must be considered in their context. The expression of an "idea" may include an important element of "information" and vice versa.

45. The expression of opinion may take different forms and may make use of a variety of media. The International Covenant and the American Convention (arts. 19 and 13, respectively) cover freedom of expression as exercised orally, in writing or in print, in the form of art or through any media of the individual's choice. Article 10 of the European Convention does not refer to any specific form of expression. However, the case law of the European Court of Human Rights has applied the relevant provisions of the European Convention to oral expression, to written or printed statements or to artistic expression.

46. Lastly, protection under international human rights instruments applies regardless of frontiers and whatever the nationality of the person concerned. The implications of this principle concern the free movement of information and ideas across frontiers, the protection of foreign journalists and correspondents, the prohibition of jamming of broadcasts from abroad, etc.

B. Permissible restrictions

47. As was pointed out earlier, the exercise of the right to freedom of expression carries with it special duties and responsibilities and may therefore be subject to certain restrictions, provided the restrictions are compatible with the basic content of the right. In consequence restrictions must meet certain criteria. They are:

Legitimacy;
Legality;
Proportionality;
Democratic necessity.

48. These criteria are derived from the Universal Declaration on Human Rights (Art. 29, para. 2), the International Covenant on Civil and Political Rights and the three regional Conventions mentioned earlier. The Special Rapporteurs are of the opinion that these criteria are universal in nature and applicable

in every situation in which restrictions of the right to freedom of expression are imposed. They can therefore be described as principles governing the question of permissible restrictions.

49. These principles are, of course, not relevant if the State adopts an approach which a priori rules out the idea of restrictions. In this connection it is worth recalling that article 5, paragraph 2 of the International Covenant provides the following:

> "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

The importance of the quoted provision is twofold. It defines the principles of the Covenant as a set of minimum standards which cannot be lowered but which may be extended. It also suggests that under the international norms concerning human rights in general the scope of the rights set out may be broadened.

50. Experience shows that the process of limiting and possibly eliminating the permissible restrictions is a dynamic one and that it is associated with democratic change. Hence the particular importance of the criterion of "democratic necessity". In the process of expanding democracy, the changing situation may require the gradual abolition of laws permitting restrictions and the elimination of criteria of legitimacy in the case of some restrictions. In short as democracy progresses the range of restrictions becomes smaller. However, it should be kept in mind that these processes vary in different societies and that there are no ready-made models that can be applied in all situations. The comments below therefore represent only a relatively broad framework within which further elaboration and refinement is needed, taking into account the specific circumstances of each society.

1. The principle of legitimacy

51. A restriction is permissible only if it has in view one of the objectives expressly enumerated in the international treaties in the field of human rights. In the International Covenant and the American Convention, the objectives which may legitimize certain restrictions are: respect for the rights or the reputation of others and the protection of national security, public order, public health or morality. The list is exhaustive.

52. The European Convention is more extensive and in addition to "national security" and, somewhat redundantly, "territorial integrity or public safety" and the prevention of disorder, lists the prevention of crime. The protection of the reputation or the rights of others is mentioned in the same terms. On the other hand, the Convention allows certain additional grounds for legitimacy when it authorizes restrictions "for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary". Article 16 of the Convention legitimizes restrictions on the political activity of aliens.

53. The African Charter refers (in art. 29) to the duties of the individual towards the family and the security of the State and affirms that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". In addition, article 29 refers to the need "to preserve and strengthen positive African cultural values". The enumeration of possible legitimate grounds for restrictions is therefore rather broad and imprecise. As in the case of the European Convention this gives added importance to the interpretation and application of the provisions.

54. The case law of the European Court of Human Rights 25/ on these questions shows that it is necessary to verify the sincerity of a State's contentions that the action taken against an individual has a legitimate basis, in accordance with the Convention. In the cases brought before it, the Court has held that this criterion has been respected, in cases concerning morality, 26/ the rights of others 27/ or the impartiality and authority of the judiciary. 28/

55. The Human Rights Committee, acting under the provisions of the first Optional Protocol to the International Covenant on Civil and Political Rights, has applied criteria of legitimacy, including those defined in article 20 of the Covenant. 29/

56. In general, it may be concluded that the principle of legitimacy applicable to permissible restrictions is decisively supported by the relevant human rights treaties and that this has reduced the area in which the State may lawfully impose restrictions.

2. The principle of legality

57. Restrictions which are not "prescribed by law" (art. 10 of the European Convention), "provided by law" (art. 19 of the International Covenant) or "expressly established by law" (art. 13 of the American Convention) are not permissible. The word "law" must be interpreted in a way encompassing constitutional and statutory provisions, as well as common law. According to the European Court of Human Rights, the law must be clear, accessible, precise and foreseeable, without however, being excessively rigid. 30/

58. A comparative analysis of the constitutions and laws of States from the point of view of their legal regulation of the right to freedom of expression and restrictions of that right might be an interesting subject for consideration by United Nations bodies in this area. During the preparation of this report an initial comparative analysis was made at an earlier stage 31/ and provides a basis for a number of general comments.

59. Most States offer constitutional protection of the right to freedom of expression. Some States without written constitution guarantee the right in accordance with their legal systems, most often by special laws. In the case of countries with written constitutions expressly guaranteeing the right to freedom of expression, a distinction can be made between countries that simply state the constitutional principle and those that have enacted special laws.

60. The number of countries in each category is roughly the same. 32/ Some constitutions protect the right to freedom of expression very laconically while others are more detailed and use formulations similar to those in the international instruments. 33/ Some constitutions prohibit censorship 34/ and a few refer to the forms in which the right to freedom of expression may be exercised. 35/

61. In the light of the foregoing it is not surprising that even a cursory comparative analysis shows that constitutions are usually imprecise with regard to permissible restrictions. They either do not mention them, or deal with them in such broad and ambiguous terms that it is difficult to determine the scope of the right they purport to guarantee. Some constitutions simply refer to the laws of the State. Often the references are broad and inexact. 36/

62. In considering laws restricting freedom of expression, a distinction must be made between countries with a specific law on information and those which rely on ordinary laws dealing with such subjects as defamation, slander or libel, pornography, the protection of minors, etc. Many countries justify restrictions which are not clearly defined or are based on an unduly broad view of the legitimacy of the restrictions, thus leaving to the State authorities dangerous discretionary powers to determine the scope of the right to freedom of expression. Another source of uncertainty is the use of concepts that assimilate certain forms of conduct to offences. In this connection mention must be made of the use in legislation of such concepts as "blasphemy", "subversion", "malice", "disinformation", "false rumours", "reprehensible behaviour", etc. 37/

63. The Special Rapporteurs believe that there is a need for a thorough analysis of national legislation concerning restrictions of the right to freedom of expression. The principle of legality has two facets. On one side it is necessary to limit the States scope to restrict the individual's freedom. On the other the use of loose concepts and excessively broad or catch-all formulations may give the State unduly large discretionary powers and thereby open the door to violations of human rights.

3. The principles of democratic necessity and proportionality

64. Unnecessary restrictions of human rights cannot be deemed permissible. Article 19, paragraph 3 of the International Covenant refers to the concept of necessity in listing the legitimate grounds for restrictions. However, the concept of necessity is not further defined. One way of interpreting the concept can be found in article 29 of the Universal Declaration of Human Rights, which links permissible limitations of the rights enshrined in the Declaration to the concept of a "democratic society". 38/ Article 10 of the European Convention is even more explicit on this point since it clearly links permissible restrictions to the concept of "democratic necessity". Even when provided by the law and pursuing a priori a legitimate objective, a restriction cannot be permissible if it does not respond to a democratic necessity, the main characteristic of which is, according to the European Court, respect for the principle of proportionality, as well as for the democratic principles of the rule of law and human rights.

65. The case law of the European Court is enlightening and helpful in providing a proper understanding of the concept of democratic necessity. In the first place the Court has pointed out that the adjective "necessary" refers to an "imperative social need", and is not a synonym of "indispensable", "reasonable" or "desirable". Moreover, the Court does not consider that the discretionary power accorded to States is unlimited. The State's discretionary power is subject to European supervision, the closeness of which depends on the importance of the restriction. The extent of the State's discretionary power also depends on the ground for legitimacy invoked. Wider discretionary power is allowed when the objective is the protection of "morality".

66. The Court defines the concept of a democratic society in a sense in which freedom of expression is one of its essential foundations. 39/ Freedom of expression is thus protected not only with respect to information or ideas favourably received or considered to be inoffensive or unimportant, but also with respect to ideas which clash with, shock or disturb the State or any sector of its population. It is by virtue of the principles of political pluralism, tolerance and open-mindedness, without which there is no democratic society, that the principle of proportionality is applied. The reasons invoked by a State which restricts freedom of expression must be pertinent and sufficient, having regard to all the circumstances of the case. The Court compares the consequences, for the public interest, of the absence of restrictions with the consequences of any restriction for the individual concerned, having regard to the community's interest in being informed. According to the Court, it devolves upon the press to disseminate information on questions debated in the political arena. In addition, the public has the right to be informed, about such questions. 40/

67. The "free play of political debate" presupposes the recognition that criticism is essential to the functioning of a truly democratic political regime. 41/ While emphasizing that the protective aim of the Convention does not mean that absolute uniformity is required or that the substantive and procedural characteristics of the domestic laws of States concerned should be disregarded, 42/ the Court takes the view that a common European tradition is the reference point for the concept of democratic society. It is presumed that member States have at least a common denominator in the democratic tradition which has led them to become parties to the Convention. Here, comparative law, as well as respect for other provisions of the Convention, helps in developing evidence of democratic necessity.

68. In short, common traditions and a relatively lengthy period of common interpretation of the Convention have made it possible for the Court to develop standards which are sufficiently coherent and flexible to permit assessment of compatibility of the various legal systems with the rules prescribed by the Convention and to prevent the concept of a democratic society from becoming ossified. The Court envisages a democratic society as an evolutionary society founded upon freedom of expression. The accepted criteria are flexible enough to follow and respect changes in society.

69. The foregoing remarks point to the fact that the concept of democratic necessity, as an internationally and legally relevant concept which has an important bearing upon the actual regime of the right to freedom of opinion

and expression, can be substantially reinforced by international institutions such as the European Court. It should be clear that courts of law are not the only institutions that can make a contribution in this regard. Other bodies supervising the implementation of international human rights instruments should strive towards the same end, notwithstanding the fact that their actual authority may be slighter. It should be noted that the Human Rights Committee has also applied the principle of proportionality 43/ which shows that in the application of international treaties certain key elements can help in developing a legally coherent interpretation even in matters as complex as the concept of democratic necessity.

III. THE QUESTION OF SANCTIONS AGAINST PERSONS WHO EXERCISE THEIR RIGHT TO FREEDOM OF EXPRESSION

70. Exercise of the right to freedom of expression may lead to conflict between the State and the individual. In such cases the individual is liable to penalty under most legal systems. While the penalites may be relieved to admissible restrictions of the right to freedom of expression it is still necessary to consider how the application of sanctions can be restricted. An initial approach to this problem was discussed in the preceding section in connection with the necessity of restricting restrictions.

71. In the Special Rapporteur's opinion, the analytical framework employed in the previous section is applicable to sanctions. Sanctions must be in conformity with the principles of legitimacy, legality, proportionality and democratic necessity. In other words, sanctions which are either illegitimate, illegal, unnecessary or disproportionate cannot be deemed permissible and are therefore violations of human rights.

A. The principle of legality

72. The principle of legality will be examined first because, if applied properly, it removes many difficulties that might otherwise arise. The principle of legality requires the elimination of all informal sanctions and all forms of prior censorship, which in practice are usually informal. The principle of legality also requires the elimination of sanctions on the basis of unduly broad or vague provisions. The law providing for sanctions must be precise and specific with regard to all the constituent elements of the restriction and the offence, especially the element of intent, which calls for particular attention. In our opinion, the laws should rule out any possibility of a presumption of bad faith, which is admissible under some national, legislation on defamation.

73. Similarly, "preventive sanctions" (censorship, banning and seizure) raise serious questions of legality, especially having regard to the inherent imprecision and arbitrariness in the definition of the material element and element of intent and of the injury likely to be caused. The inherent imprecision and arbitrariness of preventive sanctions also raise the question of the legitimacy of laws providing for such sanctions. The precision of normative texts is also directly related to respect for the principle of the individualization of sanctions. In this regard, the concepts of attempt and complicity deserve particular attention.

74. The general question arising from the foregoing concerns the arbitrariness of sanctions. If sanctions are based on laws that are vague or manifestly imprecise or formulated with clear intent to provide a "legal" basis for silencing people, they come close to "informal" or arbitrary sanctions. In the Special Rapporteur's opinion, the difference is not significant. In the case of arrest or any other form of deprivation of liberty of a person, the sanctions would at first sight constitute a violation of human rights. Moreover, such laws cannot be considered to satisfy the criterion of legality, whatever the outcome of assessment of their legitimacy.

B. The principle of legitimacy

75. The question of respect for legitimacy gives full meaning to the criterion of legality. Some sanctions are imposed under laws which are barely relevant. In other cases, the laws do not pursue any of the objectives considered legitimate within the meaning of international instruments. It must again be stressed that imprecise and vague formulations of laws are impermissible since they do not meet the requirements of either legality or legitimacy.

76. The list of criteria to establish the legitimacy of sanctions is exhaustive (see above, paras. 51-56 ...) For example, considerations relating to a country's economic well-being social or cultural interests or religion are not admissible. This restrictive approach can however be circumvented by recourse to imprecise concepts such as "morality" or "public order". 44/ The concept of "public order", for example, immediately raises the question of the legitimation of the role of the police and of the courts, parliaments and other supervisory bodies.

77. In this connection the European Convention takes a more permissive approach to the notion of "order" than the other international instruments, thus enabling the European Court of Human Rights to legitimize sanctions on freedom of expression within a particular group. However, the court has pointed out that this applies especially when, as in the case of the armed forces, disorder in a group might affect order in the society as a whole. National security cannot be invoked as a reason for imposing Sanctions merely to prevent local or relatively isolated threats to law and order. 45/

78. The enumerations in the international treaties of grounds establishing the legitimacy of sanctions are exhaustive. It is clear that no addition to the list is admissible and that the grounds listed must be interpreted restrictively.

C. The principles of democratic necessity and proportionality

79. In the preliminary report a wide range of negative sanctions against individuals exercising their right to freedom of expression was considered. 46/ The sanctions include limitations of freedom of movement, disruption of the individual's career and sanctions affecting means of expression, physical pressure, and even sanctions affecting the individual's life, liberty or security of person.

80. The difficulty is that all too often sanctions are not provided for by the laws of the States applying them or are the result of unavowed action by official bodies. Such sanctions do not of course meet the criteria of legality and legitimacy. They must be mentioned in this context, however, because they are of crucial importance to freedom of expression. The victims of these illegitimate and, usually illegal measures are generally targeted because they make use of their freedom of expression (journalists, opposition party leaders, trade unionists, etc.).

81. The reports of the Human Rights Committee provide important information in this connection. Among the seven cases of alleged violations of article 19 of the International Covenant on Civil and Political Rights in the period covered in the Committee's reports on its second to sixteenth sessions four out of nine allegations of torture were related to exercise of the right to freedom of expression. These cases are probably a representative sample (albeit very small) which demonstrate the nature of the risks involved. This is an aspect that must be borne in mind in discussing the democratic necessity and proportionality of sanctions against individuals exercising their right to freedom of expression.

82. In view of the gravity of the problem mentioned in the previous paragraph and alarming information regarding the extent and brutality of the presssure on persons exercising their right to freedom of expression, the Special Rapporteurs believe that it is essential to develop the view that States have a positive obligation to ensure respect for the right to freedom of expression. Besides fulfilling the duty of restraint or non-interference, States must take steps, especially in their criminal legislation, to ensure that freedom of expression is exercised without risk. Only in such a situation is discussion of the proportionality of sanctions possible.

83. In a situation in which freedom of expression is exercised effectively and without the risks referred to earlier, it is possible to discuss the question of the proportionality of sanctions against persons who, in the course of expressing their opinions, break the laws protecting the rights and reputations of others, public order, morality, etc. In the Special Rapporteur's opinion, deprivation of liberty is clearly a disproportionate sanction. Moreover, deprivation of liberty carries the inherent risk of leading to numerous violations of human rights. In principle it should not be provided for as a penality save in wholly exceptional cases in which there is a clear and present danger of violence.

84. Among the various types of sanctions, special mention must be made of those affecting the individual's freedom of movement and those affecting the individual's professional rights. Both types of sanctions raise questions of proportionality and democratic necessity.

85. Restrictions on freedom of movement mainly affect foreign journalists and vary in nature: the refusal of visas and accreditation, the confiscation of passports, prohibiting of attendance at demonstrations, the obligation to report regularly to the police, administrative detention at airports, selective composition of pools of reporters, etc. These restrictions affect

the individual and interfere with his work. International instruments and the machinery for their implementation do not seem to provide effective protection to foreigners in such situations. Considerations of State sovereignty are an important factor in this respect. Measures of this kind appear often to be at odds with the principle of democratic necessity. It would be useful therefore to develop appropriate international standards and machinery to oversee State practices regarding the treatment of foreign journalists.

86. Finally, in order to illustrate the range of sanctions against persons expressing their opinions, reference should be made to sanctions affecting professional rights. Some such as the prohibitions of writing, teaching or taking part in press conferences, affect freedom of expression directly. Others, such as forced resignations, "shelving", blocking of promotions and transfers, are more difficult to evaluate. It is always difficult to adduce evidence of the actual extent of such measures and to gather other relevant information. A further difficulty arises from the fact that such "sanctions" are not necessarily imposed by the State but rather by private organizations or groups.

87. It is interesting to note that the European Court of Human Rights has been somewhat restrictive in this respect and declined to recognize a violation of article 10 of the European Convention on the grounds that the Convention did not guarantee access to the civil service. 47/ The European Commission on human rights for its part considered necessary the suspension for several months of the right to practise of a lawyer who made public statements likely to discredit his profession or undermine the authority of the judiciary. 48/

88. The extent to which such sanctions are compatible with the principles of democratic necessity and proportionality is an open question and probably cannot be answered in abstract terms. Questions of this kind can only be properly answered on a case by case basis taking fully into account all the relevant circumstances. It is not clear that the United Nations can devleop appropriate methods for resolving issues of this nature.

IV. FREEDOM OF OPINION AND EXPRESSION IN THE CONTEXT OF THE STRUGGLE AGAINST RACISM AND RACIAL DISCRIMINATION

89. Analysis of restrictions placed on freedom of expression and information in order to combat racial discrimination brings out the complexity of the issues. Restrictions of this kind are recognized as permissible in most of the relevant international texts and a growing number of countries authorize them or are considering their authorization. Some of these countries face mounting racism (notably in Europe, where revisionism is also a problem) or discriminatory behaviour patterns associated with the exacerbation of nationalist sentiments. Others are taking such action for preventive or even educational purposes.

90. The following countries have recently adopted or supplemented a specific body of legislation: Argentina (1988), Brazil (1985), China (1987), Colombia (1988), Cuba (1987), France (1990), Germany, Federal Republic of (1985),

Senegal and Sweden (1989), the United Kingdom of Great Britain and Northern Ireland (1986) and the Union of Soviet Socialist Republics (1990). The following countries have specific legislation in the drafting stage: Australia, Cameroon, Chile, Mexico, the Netherlands, Niger, Spain, Sweden and Venezuela.

91. In addition, the question of permissible restrictions of freedom of expression to further the struggle against racial discrimination has attracted the attention of several non-governmental organizations, some of them specialists in the protection of freedom of expression. Article 19 held a conference on this subject in London on 27 and 28 April 1991. The monthly newsletter of Reporters Sans Frontières regularly publishes articles on the same topic. 49/ In a communication submitted to the Commission on Human Rights at its forty-seventh session, the International Council of Jewish Women expressed concern at the fact that appeals to racial or religious violence were tolerated or encouraged by certain authorities in the name of freedom of expression.

92. On the other hand, a great many Governments see no need for restrictions of this type on the grounds that racial discrimination is not a problem in their country, or because they consider it dangerous to prepare "emergency" legislation on the subject and hold that the general provisions of ordinary law are sufficient.

A. What legitimacy can attach to restrictions "necessary in a democratic society" to combat racism?

93. The term "legitimacy" is used here in the same sense as in the preliminary report. Generally speaking, freedom of opinion and expression and also freedom of information are protected. Accordingly, the expression of racist ideas may perhaps be regarded as an act of disinformation that legitimizes limitations.

94. As the Inter-American Court of Human Rights aptly points out in a decision of 13 November 1985, a society which is not well informed is not a truly free society. The Court thus affirms the principle that the right to information presupposes that the information is of a certain quality.

1. The legitimacy, under international human rights law, of restrictions imposed to combat racism

(a) The relevant instruments

95. Under article 29 of the Universal Declaration of Human Rights, limitations of the rights guaranteed in general terms by the Declaration are permissible "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare ...". As was pointed out earlier, most of the international instruments subsequently concluded embody more or less detailed statements of these grounds for the legitimacy of restrictions.

96. The document on the Copenhagen Meeting on the Human Dimension of the Conference on Security and Cooperation in Europe reaffirms in paragraph 9.1 the right to freedom of expression:

> "This right will include freedom to hold opinions and to receive and impart information and ideas ... The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."

In a general clause on restrictions, the following point is made in paragraph 24 of the document: "Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law." It might perhaps have been clearer to focus on the legitimacy of the objective. 50/

97. In the case of discriminatory measures, respect for the rights of others is directly concerned. The rights of others may be understood in this context to mean the right to equality but also the right to dignity and to protection against degrading treatment, or again the right to information. On the other hand, recourse to the idea of public order, the boundaries of which are often ill-defined, presents more of a problem. In view of its vagueness, there is a great temptation to invoke it in irrelevant circumstances, thus committing in reality a perversion of legitimacy.

98. The notion of morality appears prima facie to be in keeping with the spirit proper to anti-racist legislation, but it carries in embryo the risk of outlawing something which is simply not accepted by everybody. The idea of a moral consensus justifying restrictive measures may carry the germ of a moral dictatorship. There is no need here to labour the dangers inherent in the will to impose a moral order - Nazism is still in all our minds - or to emphasize how dangerous it would be to plead morality in order to restrict freedom of expression.

99. Among the grounds that may be advanced for restrictions, only the concept of the rights of others, the boundaries of which are fairly clearly defined, seems apt to justify the restrictions needed in the struggle against racism. Furthermore, from the standpoint of legal technique, the reference to the rights of others makes it possible for offences to be defined more strictly. The number of behaviour patterns concerned would thus be strictly limited and the risk of extending the field of repression to the criminalization of mere deviations from the prevailing norm would be neutralized. Lastly, it is less dangerous to freedoms to impose restrictions with the aim of reconciling conflicting rights.

100. The explicit or implicit reference to the rights of others is echoed in certain restrictive provisions laid down in the general interest by the international instruments.

101. Thus article 29, paragraph 3, of the Universal Declaration provides that "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations". This provision is supplemented by article 30, which reads as follows:

> "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

102. The International Covenant states the same principle in the same terms in article 5, paragraph 1.

103. The American Convention on Human Rights lays down the same rule in article 29:

> "No provision of this Convention shall be interpreted as: (a) permitting any State party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."

The same applies to article 17 of the European Convention on Human Rights, article 29 of the Universal Declaration and article 5 of the International Covenant, which use the same language.

104. The reader need not be reminded that the right to non-discriminatory treatment is a fundamental right of the human person, guaranteed by all the international instruments on human rights and the subject of a specific United Nations instrument which entered into force on 4 January 1969, the International Convention on the Elimination of All Forms of Racial Discrimination. Under article 4 of the Convention, the States parties undertake to adopt positive measures to eradicate all incitement to racial discrimination. Such positive measures may involve restrictions of freedom of expression, for the States undertake specifically to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination", etc.

105. The Convention does not simply legitimize restrictions. It lays down that in certain cases restrictions may be backed by criminal penalties. This point will be taken up again and given special attention in connection with the criterion of democratic necessity which, in the interests of respect for human rights, presupposes, inter alia, proportionality of the restriction to the legitimate objective pursued. Article 4 of the Convention and article 4 of the Covenant on Civil and Political Rights are alone in legitimizing limitations of or derogations from freedom of expression by indicating precisely what behaviour justifies restrictions.

106. Here again, what is meant is propaganda for or advocacy of hatred, incitement to discrimination, hostility and violence and the dissemination of ideas based on racial superiority or hatred. This list, which appears to assume that the culpable behaviour will receive some publicity, refers by implication to the notion of indoctrination and to that of false information or disinformation.

107. Can one conclude from this that grounds for limitation of freedom of expression might be found in the right to be well informed? In other words, the right to be well informed might serve as grounds for penalizing the dissemination of revisionist ideas or of an ideology based on theories of the superiority of a particular race. On this last point, it is desirable that before justifying measures that restrict freedom of expression, international instruments should perform their educational function properly by avoiding the use of such a term as "race" which, when applied to human beings, has no scientific meaning. Unequivocal recognition of the human race as one and indivisible appears to be regarded as the indispensable preliminary for the struggle against racism.

(b) Decisions of international and regional authorities on protection

(i) The Human Rights Committee

108. Few significant decisions of the Human Rights Committee relate to this subject. Of 18 selected decisions delivered by the Committee in connection with article 19 of the International Covenant, only two decisions relate to racism.

109. In the first case, request (117/81) M.A. v. Italy was declared inadmissible ratione materiae by the Committee on 10 April 1984. The author of the request did not specify what articles of the Covenant he considered to have been violated. The facts were as follows. In 1971, when he was 15 years old, the applicant joined the Movimento Politico Ordine Nuovo and when this organization was disbanded in 1973 he joined the Movimento Sociale Italiano. After being prosecuted in 1974 he was sentenced in 1976 to four years' imprisonment. Before the Committee the Italian Government relied inter alia on article 19, paragraph 3, of the Covenant, arguing that the protection of national security and public order was a legitimate objective. The Committee took the view that the acts alleged against the applicants were of such a nature as to be removed from the protection of the Covenant by the operation of article 5 and that in any case their prohibition was justified by article 19, paragraph 3.

110. In the second case, request (104/1981) of J.R.T. and the W.G. Party v. Canada was declared inadmissible by the Committee on 6 April 1983. The so-called "W.G." Party and the applicant were circulating particularly serious anti-Semitic messages by transmitting tape-recordings over the telephone. The Party's and the applicant's telephones were cut off on the basis of the Canadian Human Rights Act, which declares it a discriminatory practice to communicate telephonically any matter likely to expose a person or persons to hatred or contempt by reason inter alia of their religion or "race". The State party held that the disputed provisions were designed to give effect to article 20 of the Covenant and that, in contrast, the author's "right" to communicate racist ideas was not protected by the Covenant.

111. The Committee took the view that the ideas which the applicant sought to disseminate in this way clearly constituted the advocacy of racial or religious hatred, which Canada had an obligation under article 20 (2) of the Covenant to prohibit. It should be noted that the Committee was guided in one of the decisions by article 19, paragraph 3, and in the other by article 20, which directly legitimizes such measures without requiring it to be proved that the restriction applied on its authority is designed to protect the rights of others, public order or other legitimate objectives.

(ii) The European Commission of Human Rights

112. The European Court of Human Rights has made no explicit ruling on this question but defined the scope of article 17 of the European Convention in its very first decision (Lawless, 1 July 1961), stating that the purpose of article 17, in so far as it referred to groups or persons, was to make it impossible for them to derive from the Convention any right to engage in any activity or perform any act aimed at the destruction of any of the rights recognized in the Convention.

113. The European Commission, for its part, has delivered several interesting decisions. Firstly it should be noted that, unlike the United Nations texts, article 14 of the European Convention guarantees non-discrimination only in the exercise of a right specifically protected by the Convention. 51/ To widen this unduly narrow setting, the Commission tried, by virtue of article 3, which prohibits inhuman or degrading treatment, to give the protection of non-discrimination an independent scope of its own in these terms: "Without prejudice to article 14, discrimination based on race might under certain conditions constitute per se degrading treatment within the meaning of article 3 of the Convention" (10 October 1970 - Ann. 13, p. 995, Asiatiques d'Afrique orientale).

114. Reference will be made here to four of the Commission's decisions which are essential in this connection. The facts on which the first decision is based are very similar to those described in request No. 117/81 to the Human Rights Committee, which has already been cited. The second case concerns remarks deliberately made during an election campaign. The last two cases are concerned with revisionism.

115. In the first case, request (6741/74) v. Italy concerning articles 10 and 11 of the Convention and also article 14, the Commission took the view that making it a criminal offence to engage in intrigue aimed at reconstituting a Fascist party was necessary for public safety and for protection of the rights and freedoms of others. Combining article 14 with article 10, it held that a difference in treatment reserved to those who were guided by Fascist ideology had a legitimate purpose, namely, to protect democratic institutions. An implicit reference to article 17 of the Convention should doubtless be seen in this.

116. In the second case, request (D 8348/78 and 8406/78), Glimmerveen and others v. Netherlands, the aim was to obtain a finding of violation of article 10 of the Convention and of article 3 of the First Protocol guaranteeing free elections under conditions which will ensure the free

expression of the opinion of the people in the choice of the legislature. The applicant was Chairman of the Nederlandse Volks Unie, a party supporting the idea that it is in the general interest of a State for its population to be ethnically homogeneous. He was sentenced to two weeks' imprisonment for circulating tracts addressed to "Netherlanders of the white race" and containing such passages as the following:

> "The majority of our population have long since had enough of the presence in our country of hundreds of thousands of Surinamese, Turks and other immigrant workers - 'guest' workers as they are called - with whom, furthermore, there is nothing we can do here."

117. The authorities held that the content of the tract could not be described as factual information and that it constituted incitement to racial discrimination on the understanding that the notion of race included that of ethnic group. (The tracts were confiscated and the electoral lists bearing the applicant's name were invalidated.) The Government drew the Commission's attention to the international obligations of the Netherlands under the CERD Convention.

118. The European Commission held that the duties and responsibilities referred to in article 10, paragraph 2, found clearer expression in a more general provision, namely, article 17 of the European Convention.

119. The Commission took the Convention on the Elimination of All Forms of Racial Discrimination and article 17 of the European Convention as its guide in ruling that the applicants might not invoke the provisions of article 10 of the Convention, and in declaring the request incompatible with the provisions of the Convention within the meaning of article 27, paragraph 2, and therefore inadmissible (11 October 1979). The recourse to article 17, in the same way as recourse to article 5 of the International Covenant, made it unnecessary to prove legitimacy on grounds of public order, the rights and freedoms of others or other grounds.

120. The two other cases are concerned with revisionism. In the third case, request (No. 92351/81) X v. Federal Republic of Germany, the applicant complained against a judicial decision forbidding X to exhibit brochures according to which the murder of millions of Jews under the Third Reich was a lie or a piece of Zionist trickery. The authorities cited the texts making defamation an offence and specified that the ban was limited to the denial of the murder of millions of Jews. The Commission held that the murder of the Jews was a "known historic fact" established beyond doubt by overwhelming proof of all kinds. It therefore considered that the protection of the reputation of others legitimized the restriction.

121. The fourth case was more complex because the author of the request (No. 9777/82), T v. Belgium, was not the direct author of the revisionist remarks. The applicant was acting as the "author-publisher responsible" for the publication of a text written by a former leader of the Belgian Rexist movement, who had been convicted of communicating with the enemy and deprived of "the right to participate in any capacity in the running, administration, writing, printing or circulation of a newspaper or any other publication in

the event that such participation is of a political nature". This document, entitled "Letter to the Pope concerning Auschwitz", contained a commentary calling into question the reality of the extermination of millions of Jews at Auschwitz and elsewhere and reducing the enormity of the Nazi atrocities by comparison with other wartime atrocities. The domestic authorities took the protection of morality and the rights of others and the defence of order as their guide in sentencing the applicant to one year's imprisonment and a fine of 10,000 francs and declaring the offending brochures confiscated.

122. The European Commission observed that the applicant had been prosecuted, not as co-author of an offensive piece of writing, but for having participated in the publication of a piece of writing despite the fact that its author had been deprived of his rights. The Commission accordingly considered that the restriction on freedom of expression was necessary for the defence of order and to safeguard the authority of the judiciary.

123. Article 10, paragraph 2, provided the Commission with sufficient grounds for legitimizing the restrictions. Does this mean that article 17 can only be relied upon when the threat to democratic society reaches a certain degree of seriousness? This question will be considered later on during the appraisal of the criterion of "democratic society" and its corollary, the criterion of proportionality.

2. The legitimacy under municipal law of restrictions designed to combat racism

124. Here the Special Rapporteurs have essentially referred firstly to the reports submitted by States parties to the Committee on the Elimination of Racial Discrimination, secondly to the report on freedom of the press throughout the world prepared by the non-governmental organization Reporters Sans Frontières in 1991, and lastly to the information collected by the conference organized by the non-governmental organization Article 19.

125. Although almost all countries with a written constitutions guarantee the right to equality and non-discrimination, the constitutional protection of the right is in most cases confined to nationals. Valid grounds for legitimacy must therefore be sought in individual statutes.

126. A number of countries consider, as was noted earlier, that there is no need to refer to specific pieces of legislation in order to combat racism, either because offences under ordinary law make is unnecessary to have special legislation on the subject or because, according to them, they have no problem of racial discrimination. The question then arises whether such countries ought nevertheless to enact specific legislation even though it meets no criteria of legitimacy save that of abiding by the commitments made under the Convention against discrimination.

127. The criterion of democratic necessity, which is intended to preclude perversions of legitimacy, should not be used as a mere cover. For example, in one country, since a coup d'état, the newspapers are no longer allowed to publish information which is "liable to inflame racial problems (between one

ethnic group and another) or prejudicial to peace and order". Consequently most journalists are compelled to practise self-censorship, whereas the question is one that would be worth discussing democratically. In another country, the head of the state security apparatus is said to have invited journalists "to write no more articles likely to upset the highest authorities of the country", thus progressively installing a mandatory prior censorship that makes it an offence to "publish articles dealing with social, regional and ethnic differences".

128. In contrast, several countries report that they have never, or almost never, had to apply provisions permitting restriction of freedom of expression to further the prevention of racism: Australia (5 of the 26 complaints filed in 1986 and 1987 alleging racial discrimination involve freedom of expression), Chile, Cuba, Hungary, India, Jordan, Luxembourg, Mongolia, Morocco, Norway, Pakistan and the Philippines. The periodic reports submitted by these countries to the Committee on the Elimination of Racial Discrimination should be consulted for further information. Apart from countries with a "multiracial" and "multi-ethnic" composition, it appears to be mainly in European countries that restrictive provisions take into account the criterion of proportionality on which the application of the principle of democratic necessity is based. 52/

129. Assessment of the legitimacy of restrictions varies widely from country to country. The principle of democratic necessity tends to govern the scope of the principles of legality and of legitimacy.

B. The scope of the principle of democratic necessity

130. The preliminary report drew attention to criteria relating to the concept of the democratic society such as pluralism, tolerance and the spirit of openness. It will be noted that these criteria are two-edged. They can be used to justify total freedom of expression or to permit limitations of that freedom with a view to preserving it, without going so far as to maintain, for example, that in a free society tolerance requires us to tolerate the intolerable. The danger is that censorship or restrictions imposed on the expression of opinions held by the current majority to be intolerable may delegitimize marginal ideas that might be legitimate tomorrow. No one knows in advance what social, moral or intellectual evolution may become desirable for the future of mankind or possible.

131. The principle of democratic necessity therefore needs to be defined in the light of comparative law and with reference to the rights expressly guaranteed by the international instruments on the protection of human rights. Comparative law shows that many countries have adopted specific and restrictive bodies of legislation in order to combat racism. It should perhaps be mentioned that the First Amendment to the United States Constitution, cited by a handful of neo-Nazis who had been refused permission to demonstrate, enabled them to win their case. A recent decision by the United States Supreme Court, however, although directly concerned not with combating racism but with the right to information, shows that the United States legal system also accepts limitations. The Supreme Court,

on examining an appeal on grounds of unconstitutionality against a decision prohibiting the rebroadcasting of recorded telephone conversations between General Noriega in prison in Miami and the outside world, confirmed the original judgement. 53/ Thus the highest legal authority in the United States, by not invalidating an injunction reducing freedom of the press, confers on freedom of expression a relative and not absolute character.

132. Lastly, it should be noted that most specific bodies of legislation in democratic States do not specify the criteria that characterize a "democratic society", in particular the rule of law and the criterion of proportionality. The same applies to the relevant international instruments.

133. There are three possible situations of principle. Does the pre-eminence of law require that offences should be precisely defined in all their constituent elements? Does the criterion of proportionality entail weighing the legitimacy of restrictions against the legitimacy of expression? Does proportionality preclude unduly severe restrictions or, more specifically, does it fix a threshold which cannot be undercut without threatening the very existence of freedom of opinion and expression?

1. The definition of offences and the pre-eminence of law as a democratic necessity

134. Defining racism in terms compatible with the principle of a democratic society is a complex and difficult undertaking, as is apparent from a study of the relevant international instruments, the International Covenant on Civil and Political Rights and the CERD Convention.

135. The Human Rights Committee, in a general comment on non-discrimination (CCPR/C/21/Rev.1/Add.1), after mentioning the absence of any definition in the Covenant, reproduced the definition given in article 1 of the CERD Convention and took the view that the term "discrimination" used in the Covenant should be interpreted on the same lines, that is to say as having the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all human rights and fundamental freedoms.

136. Discrimination, then, will be defined by its effect or intended purpose. The reference to "purpose" presents a difficulty, for in this field it is hard to distinguish from motive. In many legal systems, motive - which differs from intention - cannot be taken into account in defining an offence. Taking it into account as a constituent element of an offence is generally regarded as a characteristic of totalitarian societies, and considering only the effect irrespective of the intention is regarded as a characteristic of authoritarian societies. This aspect of the problem demonstrates once again the vital importance of the criterion of a democratic society as a condition for the satisfactory functioning of standards designed to combat racism and racial discrimination. Defining racial discrimination as discrimination based on "race" and "ethnic" origin would merely increase the difficulty. How, in a democratic society, can we even attempt to define "race" or "ethnic group"? Besides, article 20 of the International Covenant calls for the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Here incitement is made the main punishable act.

137. Similarly, article 4 of the CERD Convention requires States to make it an offence, in addition to the dissemination of ideas, to engage in incitement to, provocation of and assistance in racist activities. While such behaviour falls within the traditional definition of complicity, the definition of racist activities as the principal act remains an open question, while the idea of dissemination appears to require the existence of some form of publicity to represent the material element.

138. As to restrictions, the reports of States parties to the CERD Convention show that in most instances they are couched in somewhat vague terms. Few countries mention publicity as representing the material element (Austria, Barbados, Denmark and Kuwait). For some, publicity is not even a constituent element (Sweden). Similarly, few countries refer to intention (Austria, Barbados, Belgium, Denmark and New Zealand). Some legislations work on the basis of the element of intention, a reversal of the burden of proof (France and the United Kingdom). Aggravating circumstances may be provided for in the case of non-specific offences, depending on the motive (Argentina) or the intended victim (Algeria). In the case of specific offences, publicity may also be accepted as an aggravating circumstance (Czechoslovakia). Lastly, some legislations refer to revisionism (France and Germany). French law in particular defines revisionism by express reference to the definition of crimes against humanity given in article 6 of the Charter of the Nürnberg Tribunal annexed to the London Agreement.

2. The criterion of proportionality as applied to the legitimacy of restriction and the legitimacy of expression

139. Applying the principle of proportionality necessarily entails a value judgement on the ideas expressed, which is not the least of the difficulties - indeed, not the least of the dangers - of imposing restrictions. The interest of the person to whom the expression is addressed is taken into account.

140. Whatever degree of precision the legislator may achieve, the decisive role remains that of the judge. Even so, as we have just seen, the French Law cited (1990) referred back to the definition given in the Charter of the Nürnberg Tribunal and further provided that penalties would be applied only for disputing the reality of crimes against humanity whose perpetrators had been convicted by a French or an international court. The purpose of this was to avoid a situation in which, in a press trial instituted to investigate whether writings or remarks fell within the scope of the law, the judge would find himself having to act as a historian, which would be clearly outside his competence.

141. Before the law in question was passed in 1990, the judge in the Faurisson case had already found it necessary to specify that "it was not for him to confirm history or, in consequence, to take sides for or against the theses put forward by the accused", and he confined himself to a finding of defamation.

142. Can it be argued that only deliberate disinformation could justify restrictions? Between the extremes of avowed opinion and true information by way of disguised opinion, tendentious information and information about opinions, the difficulty of appraisal will be readily apparent.

3. The criterion of proportionality as applied to the extent of the restriction by comparison with the seriousness of the behaviour

143. Article 4 of the CERD Convention enjoins States parties to declare that the behaviour patterns it defines are offences. In most democratic States, however, an offence can be defined, as we have seen, only through the characterization of an element of intention. It is specifically this element of intention that imparts a degree of seriousness to the offending behaviour.

144. Article 4 specifies neither the nature of the criminal penalties required nor their degree of seriousness. In this connection, the question of imprisonment calls for some discussion as it raises a problem of principle with regard to the criterion of proportionality. Can the abuse of expression really justify deprivation of liberty? Furthermore, apart from the fact that some legislations analysed in the reports of States parties to the CERD Convention set the maximum penalties very high, in the light of the abuses associated with imprisonment, should not this penalty be called seriously into question in the context of this report?

145. Does not the trial that precedes the passage of sentence rather than the penalty itself, perform an educational function which is essential in this connection? Resort to the penalty of imprisonment also raises the question of its effectiveness. In view of its gravity, there may well be a risk that the judges will either be reluctant to impose a penalty of imprisonment where they have found the accused guilty, or be wary about finding that offences have been committed - which, as we have seen, is a possibility in view of the somewhat vague definition of the offences. The difficulty is illustrated by the regrettable example of a decision taken by Belgian judges who refused to qualify the term "bougnoule" as racist and decided that it meant "badly dressed".

146. But the non-effectiveness of a criminal penalty greatly reduces its educational and preventive function (cf. the report of the Council of Europe on decriminalization, 1980), when it does not produce an effect opposite to that intended.

147. Suspension of the right to be elected or a fortiori of the right to be a newspaper editor - other criminal penalties which can be contemplated - raises serious questions, in particular when the offender is not directly to blame, which in the case of newspaper editors is most often the case. The Rapporteurs' opinion is that these penalties should be imposed only as a deterrent, i.e. at the end of a period of multiple recidivism, implying that the offender required to assume responsibility for the offending material has been repeatedly warned to cease and desist.

148. On the other hand, the right of reply - regarded as a criminal penalty, not merely as civil redress, and very widely extended to associations - and publication of the convicting judgement would not present any difficulties with regard to the principle of proportionality. The Rapporteurs are in favour of these measures.

149. To conclude on this point, the Special Rapporteurs wish to emphasize that resort to criminal penalties - accompanied by the reservations just expressed - should form part of a comprehensive policy which gives priority to the educational and preventive approach. 53/

Notes

1/ K.J. Partsch, "Freedom of conscience and expression, and political freedoms", in L. Henkin, ed., The International Bill of Rights, New York, 1981, p. 216.

2/ In addition to the International Covenant on Civil and Political Rights, mention should also be made of the basic regional conventions on human rights. The European Convention on Human Rights (1950) contains, in article 10, a broad formulation of the right to freedom of expression and a set of carefully elaborated provisions relating to restrictions thereto. The American Convention on Human Rights of 22 November 1969 contains, in article 13, a broader elaboration of "freedom of thought and expression". The African Charter of Human and Peoples' Rights contains, in article 9, the main elements of paragraph 2 of article 19 of the International Covenant on Civil and Political Rights. A more detailed consideration of these instruments will be found in chapter II.

3/ K.J. Partsch, op. cit., p. 217.

4/ United Nations Action in the Field of Human Rights, 1980, pp. 177-186.

5/ K. Tomasevski, "Freedom of information: an old human right and a new one", paper prepared for the Conference on the Third Generation of Human Rights, Oxford, 29-31 May 1987, p. 4.

6/ Ibid.

7/ Many Voices, One World, Report of the International Commission for the Study of Communication Problems, UNESCO, Paris 1980, p. 172.

8/ The idea of considering the right to communicate on the basis of its constituent elements is also mentioned in the report quoted above, ibid., p. 265.

9/ K. Tomasevski, op. cit., p. 7. R. Dahl regards the existence of genuine pluralism of information resources as the first step in the process of building a democratically organized State. See R. Dahl, "Democracy and human rights under different conditions of development", paper prepared for the Nobel Symposium on Human Rights, Oslo, 20-23 June 1988, pp. 17 and 18.

10/ F. Delperre categorizes as follows the impediments which in his opinion amount to actual limitations of the exercise of the right to freedom of expression in the following way: (1) economic limitations which make it difficult or even impossible to obtain or transmit information; (2) technical limitations; (3) sociological limitations resulting from particular social environments; and (4) institutional limitations related to the fact that individuals live in hierarchically organized groups. F. Delperre, "Libres propos sur la liberté d'expression", Revue de l'Administration publique 1977-78, p. 103.

11/ Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-eighth session, Supplement No. 40, (A/38/40), annex VI, General comment 10.

12/ For some historical examples of the problem of the criminalization of sedition, see D. Kairys, "Freedom of speech", in Kairys, ed., The Politics of Law, pp. 146 and 147.

13/ For a detailed analysis of the problems, see Mireille Delmas-Marty, Raisonner la raison d'Etat, Presses Universitaires de France, particularly chapter III entitled "Affaires de presse", pp. 89-120. For a general consideration of the concept of public order in the framework of limitations on human rights, see Erica-Irene A. Daes, Freedom of the Individual, United Nations publication, Sales No. F.89.XIV.57, Part II. For a systematic interpretation of provisions of the International Covenant on Civil and Political Rights containing limitations and restrictions see Siracusa Principles, (E/CN.4/1985/4, annex).

14/ Report of the Human Rights Committee, op. cit., General comment 20, para. 1).

15/ Ibid.

16/ Ibid.

17/ Here it is assumed that emergency regulations are in accordance with the requirements of article 4 of the Covenant. Situations which contravene those requirements pose additional problems.

18/ Term used by K.J. Partsch, op. cit. p. 224.

19/ For a critique of some of these systems, see K.J. Partsch, ibid., pp. 224-226.

20/ Here, of course, we have in mind permissible restrictions dealt with in section A of this chapter.

21/ For a thorough study based on empirical facts, see Intellectual Suppression, edited by Brian Martin, C.M. Ann Barker, Clyde Manwell and Cedric Pugh, eds., London, Angus and Robertson, 1986.

22/ See, for example, Commission on Human Rights resolutions 1988/39 and 1989/56 specifically dealing with these issues.

23/ See the report by Mrs. Nicole Questiaux on states of siege or emergency (E/CN.4/Sub.2/1982/15).

24/ See the series of annual reports by Mr. Leandro Despouy containing lists of States which proclaim, extend or terminate a state of emergency; the latest among them is contained in document E/CN.4/Sub.2/1991/28.

25/ The case law of the European Court of Human Rights includes the following: De Becker case, Decision of 27 March 1962, Series A; Glasenapp case, Decision of 28 August 1986, Series A 104; Kosiek case, Decision of 28 August 1986, Series A 105; Barthold case, Decision of 25 March 1985, Series A 90; Case of Markt Intern Verlag GMBH and Klaus Beerman, Decision of 20 November 1989, Series A 165; Handyside case, Decision of 29 April 1979, Series A 24; Case of Muller and Others, Decision of 24 May 1988, Series A 133; The Sunday Times case, Decision of 27 October 1978, Series A 30; Lingens case, Decision of 8 July 1986, Series A 103; Barford case, Decision of 22 February 1989, Series A 149; Weber case, Decision of 22 May 1990, Series A 177; Case of Groppera Radio AG and Others, Decision of 28 March 1990, Series A 173 and Autronic AG case, Decision of 11 May 1990, Series A 178.

26/ Handyside and Muller cases.

27/ Lingens, Bartholt and Markt Intern Verlag cases.

28/ The Sunday Times and Bartholt case.

29/ Communications No. 104/1981 and 117/1981 concerning, respectively, dissemination of anti-semitic messages and reorganization of a Nazi party.

30/ The Sunday Times case.

31/ See the preliminary report (E/CN.4/Sub.2/1990/11), paragraphs. 53 to 75.

32/ Ibid., paragraph 54 (c).

33/ Ibid., paragraphs 56 and 57.

34/ Ibid., paragraphs 59 and 60.

35/ Ibid., paragraph 62.

36/ Ibid., paragraphs 63 to 68.

37/ Ibid., paragraphs 69 to 72.

38/ See the study by Mrs. Erica-Irene Daes on the duties of the individual towards the community (E/CN.4/Sub.2/432/Rev.2).

39/ The Handyside case.

40/ The Lingens case.

41/ Ibid.

42/ The Sunday Times case.

43/ For example, with regard to Communication No. 44/1979.

44/ For a detailed analysis of the concept of public order, see the study by Mrs. Erika-Irene Daes (E/CN.4/Sub.2/432/Rev.2).

45/ Syracuse Principles (E/CN.4/1985/4, annex, para. 30).

46/ See E/CN.4/Sub.2/1990/11, paragraphs 132 to 137.

47/ The Kosiek case.

48/ Document D 10414/83. DR 40214.

49/ See, in particular, Nos. 16, 17, 18, 22 and 24 for 1990 and 1991.

50/ See, for example, paragraph 9.5 concerning the right of everyone to leave his country and to return.

51/ Recently the Parliamentary Assembly of the Council of Europe again recommended that a general clause on non-discrimination should be introduced into the European Convention on Human Rights (Resolution 1134/1990) to bring it into line with the standards of the International Convenant on Civil and Political Rights, which includes such a clause.

52/ See periodic reports to CERD.

53/ In this connection mention may be made of the approach adopted in France by the National Advisory Commission on Human Rights. In its 1990 report to the Prime Minister, the Commission addresses itself essentially to prevention. Only a quarter of the chapter on responses to racism deals with punishment.

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and Protection of Minorities
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Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

The right to freedom of opinion and expression

Final report prepared by Mr. Danilo Türk and
Mr. Louis Joinet, Special Rapporteurs

Conclusions and Recommendations

I. CONCLUSIONS

1. The Rapporteurs have decided to address an issue on which there has been little discussion so far and is posed by the main international human rights instruments. One is in fact aware that these instruments specify:

(a) On the one hand, that there are certain rights from which no derogation may be made in any circumstances whatever, including under a proclaimed state of emergency; this is tantamount to saying that there can be derogations from the other rights;

(b) On the other hand, that restrictions may be imposed on certain of the fundamental freedoms guaranteed by these instruments even when there is no emergency.

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2. If these restrictions are to be admissible in a democratic society, two conditions must be met:

(a) They must be provided for by law;

(b) They must be necessary:

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security, public order, public health or morals.

3. This is the case in respect of articles 18 and 19 of the International Covenant on Civil and Political Rights. In the light of the debates on this point to which the preliminary report (E/CN.4/Sub.2/1990/11) and the updated report (E/CN.4/Sub.2/1991/9) gave rise, the Rapporteurs consider, at the time of concluding their final report, that they have done useful work. This report endeavours above all to be an instrument for analysis, whose purpose is to help to assess the extent to which the standards concerning freedom of opinion and expression are respected when decisions are taken in this area.

4. Four kinds of situations in particular are involved:

(a) The information brought to the attention of the Rapporteurs regarding criminal convictions - even persecution - frequently incurred by journalists, shows that, in most instances, they are charged with having infringed provisions of internal law which, upon verification, almost invariably turn out to be restrictions that are inadmissible in a democratic society. From that point of view, this report can be used by journalists and other professionals in the field of information, as an instrument for the defence of their rights.

(b) The present period shows that many Governments which come to power as part of a democratization process are confronted with these forms of restrictions, constituted for example by the possible closure of former press organs or the replacement of their staff by teams that have a non-totalitarian concept of information. How far are such restrictions admissible?

(c) The rise of xenophobia and racism, and even of revisionist or neo-Nazi ideas, especially in those countries which nevertheless consider themselves to be among the most democratic, is causing the Governments in question to take measures, including legislative measures to restrict, and even prohibit, with criminal sanctions, if necessary, the dissemination of such ideas. There again it is therefore important to ensure that the cure - in other words, the admissible restrictions - is not worse than the evil it is designed to remedy.

(d) Following cases of serious manipulation of international opinion, for example in Timisoara during the events in Romania or during the Gulf War, some information media organizations are examining their professional code of ethics: such an exercise would have to face up to the potential dangers contained in the theory of admissible restrictions, if only to guard more effectively against them, by limiting them.

5. Restrictions must be interpreted and applied restrictively. In particular they must be in conformity with the principles of legitimacy, legality, proportionality and democratic necessity.

II. RECOMMENDATIONS

6. The following proposals are submitted by the Rapporteurs to the Sub-Commission for its views, and for transmission to the Commission on Human Rights for its consideration and for appropriate decision, if necessary.

A. Regarding standard-setting

In consultation with professional circles in the information media, including the specialized non-governmental organizations, there should be a discussion of the conditions under which the Sub-Commission could take the initiative of drawing up specific safeguard standards, especially with a view to lessening the possible risks to democracy of the theory of the so-called "admissible" restrictions. At the same time, the desirability of identifying those elements that constitute the "hard core" of the freedom of opinion, expression and information which in no circumstances might give rise to restrictions or derogations could be studied.

B. Regarding protective measures

The many irregular sanctions on serious persecution to which the journalists are too frequently subjected might justify the introduction of a special procedure to assure the protection of professionals in the field of information. Such a procedure could take the form of the appointment of a special rapporteur or a working group of the Commission on Human Rights or, alternatively, a request to the Secretary-General to prepare periodic reports on questions concerning the protection of professionals in the field of information. The appointment of a special rapporteur would seem the most appropriate option. It is important that such a procedure involve cooperation with writers, editors, printers and other professionals in the field of information and that it be carried out with the necessary attention being given to, and coordination with, UNESCO and other specialized agencies and relevant United Nations organs. This initiative should be distinguished from those relating to the status of journalists who are on "dangerous assignments", which is another issue.